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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. WILLIE A. TORRENCE, Defendant and Appellant.	A155017 (Alameda County Super. Ct. No. 171910)

A jury found defendant Willie A. Torrence guilty of first degree murder (Pen. Code § 187, subd. (a) [1]) (count one), attempted first degree murder (§§ 187, subd. (a), 664) (counts two and three), shooting from a motor vehicle (§ 12034, subd. (c)) (counts four and five), and possession of a firearm by a felon (§ 12021, subd. (a)(1)) (count 7), arising from a drive-by shooting in which a three-year-old child was killed and two adults were injured. The jury also found true firearm enhancement allegations (§ 12022.53, subd. (d)), related to counts one through five; gang enhancement allegations (§ 186.22, subd. (b)), related to counts one through five and seven; and one prior prison term enhancement allegation (§ 667.5, subd. (b)). Defendant was sentenced to a total aggregate term of 121 years to life.

On appeal, and in a related habeas petition consolidated with the appeal, we affirmed the judgments and summarily denied defendant's habeas petition. (*People v.*

[1] All further unspecified statutory references are to the Penal Code.

Torrence (October 30, 2017, A142592, A150345 [nonpub. opn.].) While defendant's petition for review was pending before the California Supreme Court, the Penal Code was amended to permit the trial court to strike certain firearm enhancements in the interest of justice, discretion that did not exist when defendant was originally sentenced. (Stats. 2017, ch. 682, § 2, amending § 12022.53, subd. (h) (§ 12022.53(h)).) The California Supreme Court granted review and transferred the matter back to this court with directions to vacate our prior decision and reconsider the case in light of the new legislation. After receiving and considering the parties' supplemental briefing, we reissued our opinion, modified in part, to provide for a limited remand to the trial court to hold a new sentencing hearing to consider whether to strike one or more of the firearm enhancements; we again affirmed the judgment in all other respects and summarily denied the habeas petition. (*People v. Torrence* (Mar. 19, 2018, A142592, A150345 [nonpub. opn.].)

At resentencing, the trial court declined to strike any of the firearm enhancements, and ordered that the original sentence of an aggregate term of 121 years to life was to remain in full force and effect. Defendant appeals, arguing he is entitled to a new sentencing hearing because the trial court abused its discretion in rendering its sentencing decision. We affirm.

FACTS

A. BACKGROUND[2]

The charges filed against defendant and his codefendant Lawrence Denard (collectively referred to as defendants) arose from an incident in August 2011. A witness saw a car driving slowly and then saw a man, later identified as Denard, shooting a gun out of the passenger window in the vicinity of a three-year old child and two adult victims who were walking together on the sidewalk. The two adult victims testified that there was an ongoing feud between people who lived in the "65th Avenue Village"

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[2] Our discussion is taken, in part, from our opinion in A142592 and A150345. (*People v. Torrence* (Mar. 19, 2018, A142592, A150345 [nonpub. opn.].)

housing project and people who lived in the "69th Avenue Village" housing project. According to the adult victims, the shooter and driver were associated with the people who lived in the 69th Avenue Village housing project. As the car passed by, one adult victim saw that the driver, identified as defendant, was "mugging" or "looking hard" at him. As the car passed, the adult victim said to his companion "there goes those 69th cats." The car made a U-turn and came back, and the adult victims heard gunshots. The adult victims were shot and injured, while the child was shot and died before the ambulance arrived on scene.

A police lieutenant, testifying as an expert on gangs and gang culture, described the ongoing feud between the gangs who lived in the 69th Avenue Village housing project (69th Village gang) and 65th Avenue Village housing project (65th Village gang). The officer opined, based in part on defendants' tattoos, material seized from their phones and social media accounts, and statements made to the police, that defendants were members of the 69th Village gang. The officer also opined, based on the adult victims' tattoos and the location of their prior drug sales, that the adult victims were members of the 65th Village gang. Given a hypothetical question that assumed numerous facts for which there was evidence, including a daytime drive-by shooting, and "mean-mugging," the lieutenant concluded that defendants' conduct was gang-related and that the crimes would serve to enhance the gang's reputation for violence.

The jury found both defendants guilty on all substantive counts and found true all sentencing enhancements. The court sentenced defendant to an aggregate term of 121 years to life consisting of the following terms: 25 years to life on the murder conviction, with a consecutive term of 25 years to life for the related firearm enhancement; 7 years to life on each attempted murder conviction, with a consecutive term of 25 years to life for the related firearm enhancement for each conviction, and a consecutive term of 3 years (upper term) for the gun possession conviction, with a consecutive term of 4 years (upper term) for the related gang enhancement. The court stayed all sentences on the remaining convictions and sentence enhancement allegations.

B. Resentencing on Remand

The hearing on resentencing was held on July 26, 2018. The trial court set forth the contours of the remand hearing. The court explained that the hearing was for the limited purpose of determining whether the court should exercise its discretion under section 12022.53(h) to strike the firearm enhancements. The court had a "clear recollection of the entire trial" which it would consider, along with any additional evidence and argument presented at the hearing. The court had read and would consider the following documents: our appellate court opinion; a three-page defense sentencing memorandum; and the trial prosecutor's documents regarding both defendant and co-defendant, including the district attorney's previous recommendations and the probation officer's reports and recommendations.

The trial prosecutor urged the court to decline to exercise its discretion to strike the firearm enhancements, emphasizing that all of the elements of the firearm enhancements had been proven beyond a reasonable doubt, and the trial evidence demonstrated that defendant, as the driver of the car, acted, "with full knowledge and intent" of the proposed actions of his codefendant, including evidence that defendant had tried to dissuade the testimony of witnesses. The trial prosecutor also asked the court to consider, as an aggravating factor, that the trial evidence demonstrated defendant was "a member of a gang and actively engaged in the criminal wrongdoing of the gang's activities," including previous arrests and admissions of his use of firearms for the protection of the gang members against rival gang members. The trial prosecutor also informed the court that it would be appropriate to consider any mitigating factors, but the probation department officer had found no mitigating factors in regard to either the circumstances of the crimes or defendant's personal circumstances.

Defense counsel's argument focused on defendant's circumstances at the time of the crime, the effect of the sentences as originally imposed, and defendant's activities in prison. At the time of the crimes, defendant was 25 years old and, while he had participated in the crimes, he was not the shooter albeit concededly he had put the car into a position where the shooter "could do his mischief." If his sentences remained

unchanged he would die in prison, and even if the court struck all of the firearm enhancements, he would still face "an awful lot of time in prison." Additionally, in the three years that defendant had been in prison, he had "learned something about the gang business," taken anger management classes and college courses, including computer science and business classes, not been involved in any disciplinary actions, and, because of his good behavior, had the possibility of being transferred to a lower-level prison.[3] In conclusion, counsel asked the court to "take the entire picture into consideration and consider strongly reducing the [section] 12022.53[(h)] clauses that have made this sentence such a horrible one."

The court also permitted defendant's "allocution," in which he stated: "Everything [the trial prosecutor] said, as far as gang and everything, basically I was convicted of just being a gang member. These enhancements with these firearm enhancements and everything, all this is D.A.'s theory [sic]. All of this is I was with my co-defendant, I knew this, I knew that. That was the D.A.'s theory. There is no evidence that ever shows that I knew anything or proved that I knew he had a gun. It's his theory, and they went with his theory and convicted me on his theory. [¶] This is not evidence. Them [sic] is not facts. So me being convicted as a gang member because I hang around certain individuals or I grew up with certain individuals. I have a whole gang packet about crimes from 1979 all the way up until 2011 when my crime happened, and . . . none of those crimes were convicted under gang theory. A lot of them crimes, people was admitted gang members from both sides, shooting back and forth, retaliatory killings, everything, but the moment my crime happened, it's a gang crime, and we did this for the gang and for this and for that. That's all his theory. [¶] So for me to get all this time is

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[3] In a footnote in his opening brief, defendant states in a somewhat conclusory fashion, "This Court could take judicial notice of the fact that [defendant] has in fact been transferred from Corcoran State Prison to California State Prison-Solano, which is a lower level prison." Defendant's request for judicial notice is not in compliance with the requirements of California Rules of Court, rule 8.252. While we have the power to take judicial notice, on our own motion, we see no reason to do so as the information is not necessary to our resolution of this appeal.

based [on] . . . his theory. Like, . . . the only thing that put me at the scene was a witness. He can say the car, he can say this, he can say that. There is no evidence that I was at that scene, period, but an eyewitness saying I was there. [¶] So for him to go up on this theory, them writings in my cell. Them was raps or whatever. There was evidence at trial that showed I was rapping when I was on the street. I showed videos of my show and everything. So for him to put all these theories together and make it seem like I'm just this outstanding gang member, everything I do is for the gang this, everything I do is for gang that, that's all theory. That's his theory. Them ain't even facts [sic]. [¶] That's all I wanted to say, though."

The trial court declined to strike the three 25-year firearm enhancements, and ordered that defendant's previously imposed aggregate sentence of 121 years to life was to remain in effect. The trial court had "a clear recollection of the facts of this case having been the trial judge and having sat through the entire presentation of evidence," specifically noting this court's finding that there was "overwhelming evidence" of both defendants' guilt as to the charged offenses and the gang enhancements.

The court specifically commented on defendant's involvement in the charged offenses: "[T]his defendant . . . was driving the car that was used in this crime. As the driver, and driving alongside where the members of the rival gang were walking, he made visual contact with them, engaged in . . . mean-mugging, that is, making gestures, facial expressions, indicating disapproval of the members of the opposing gang. [¶] Then [defendant] made a U-turn, changing the direction of his car, drove as close as possible to his intended victims, the members of the rival gang, so as to afford his co-defendant . . . the best possible vantage point to conduct his murderous assault on the members of the rival gang," with the court finding such conduct "as willful and deliberate, premediated." "[Defendant] . . . was not a bit player, he was not an unwilling participant, he was not a minor participant. He was heavily involved as a major principal actor in this assault. There is no question in [the court's] mind about that. There was no question in the jury's mind about that." The court further noted that the consequences of the shooting, of course, was that the intended victims, members of the rival gang, were not killed, but

rather a three-year-old child riding a tricycle or push-car had been killed, literally dying in the mother's arms. The court noted that the image of the child being gunned down would never leave the court. "Just [considering] the facts . . ., if there was ever a case where the defendant's conduct merited imposition of all of the penalty enhancements, this is the case, and these are the defendants. It would not only not be in the interest of justice to do otherwise, it would be a travesty of justice for this Court to strike those penalty enhancements in view of these facts with the murder of [a] three-year-old [child]."

The court also specifically commented on a few of the "many factors in aggravation which are present in this case." The court found defendant's attempt to intimidate or kill witnesses against him, "established by overwhelming evidence," was "a very significant factor in aggravation" in support of the decision not to strike the firearm enhancements. The court found "noteworthy" defendant's prior criminal history, prior felony convictions, and prior prison incarceration. The court also made specific mention of one particular incident when defendant, as a juvenile, and his codefendant Denard, as an adult, had assaulted and robbed a street vendor. During the incident, defendant put a gun to the chest of the street vendor and racked the slide that put a round into the chamber, while codefendant Denard knocked the vendor to the ground to rob him. A juvenile sustained finding was made against defendant for robbery with use of firearm. The court also mentioned defendant's criminal history as an adult: conviction for possession of a firearm (§ 12025); and conviction for domestic violence for which he was sentenced to state prison. The court also found there was "overwhelming evidence," of other aggravating factors, including that the crimes "involved great bodily injury, a high degree of callousness. [Defendant] was acting in concert with his co-defendant . . .; [t]he [three-year-old] victim . . . was particularly vulnerable . . .[;] [t]he manner in which the crime[s] [were] carried out indicated planning . . . and thought that these two defendants put into the acts of revenge against their rival gang members." The court noted, "It goes without saying, but the probation officer notes nevertheless this violent conduct indicates a serious danger to society. The probation notes that the defendant . . . has served one

prior prison term, that he was on parole when the crime was committed, and obviously his performance on parole was very bad." The court further considered that the probation department officer found no circumstances in mitigation. (Cal. Rules of Court, rule 4.423.) After carefully reviewing the trial evidence, and the evidence and testimony presented at the sentencing proceedings, the court similarly could not find any mitigating factors that would indicate it should exercise its discretion in the interest of justice to strike the firearm enhancements; rather, "it would be a travesty of justice" to do so.

The court concluded its ruling with the following comment: "As I have said before, I will repeat, if there ever was a case, if there were ever two defendants where all penalty enhancements concerning the use of a firearm should be imposed and should not be stricken, this is the case and these are the defendants. [¶] Accordingly, in the exercise of my discretion as to the [d]efendant . . ., I order that all penalty enhancements previously imposed shall remain in full force and effect. [¶] To put it another way, I understand, as I repeatedly stated, that I have the discretion to strike some or all of these penalty enhancements. For all of the reasons that I have stated, I decline to exercise that discretion. All aspects of the sentence previously imposed, both the substantive charges and the penalty enhancements shall remain in full force and effect."

Defendant's timely appeal ensued.

DISCUSSION

I. Standard of Review

We review a trial court's sentencing determination for abuse of discretion. (*People v. Sandoval* (2007) 41 Cal.4th 825, 847.) In applying this standard, it is neither our role to substitute our reasoning for that of the trial court nor to "reweigh valid factors bearing on the [court's] decision . . . ." (*People v. Scott* (1994) 9 Cal.4th 331, 355.) In the absence of a showing to the contrary, " 'the trial court is presumed to have acted to achieve the legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.' [Citation.]" (*People v. Superior Court* (*Alvarez*) (1997) 14 Cal.4th 968, 977–978.)

The firearm enhancements at issue here were imposed under section 12022.53, subdivision (d), providing for an additional and consecutive term of 25 years to life to the sentence of an offender who, in the commission of a qualifying felony, "personally and intentionally discharges a firearm and proximately causes great bodily injury . . . or death, to any person other than an accomplice." For the reasons we now explain, we find defendant has failed to demonstrate the need for a new resentencing hearing.

Defendant initially argues the trial court failed to give individualized consideration to him and his role in the crimes. In support of his argument, he asks us to consider two statements made by the court in referring to both defendants, and then argues the court improperly "lumped" them together, and, its treatment of defendant was "severely prejudicial," because defendant was not the shooter, and had not fired, brandished, or even possessed a gun or any weapon at the time of the offenses or on the day of the offenses. However, a fair reading of all the trial court's comments makes it quite clear that the court considered defendant's past criminal history, his conduct during the criminal offenses, and his conduct after the criminal offenses, separate and apart from his codefendant's circumstances. Accordingly, defendant's claim of error on this ground fails.

We also see no merit to defendant's claim that the trial court abused its discretion by "labelling" him as less deserving of consideration than defendants who personally committed murder and other serious crimes. According to defendant, the trial court placed him, "a non-shooter and a non-possessor of a firearm," in the same category as one who personally used a firearm to commit a violent crime. However, defendant's argument misconstrues the law. Section 12022.53, subdivision (e)(1) states, in pertinent part, that the firearm enhancement shall apply to any person who is a principal in the commission of the offense if it is pled and proven that the person violated section 186.22, subdivision (b), by committing the offense to benefit a criminal street gang. (§ 12022.53, subd. (e)(1); see *People v. Garcia* (2002) 28 Cal.4th 1166, 1171 (*Garcia*) [section 12022.53, subd. (e)(1) "imposes vicarious liability . . . on aiders and abettors who commit crimes in participation of a criminal street gang. [Citation.]"]; *People v. Brookfield*

(2009) 47 Cal.4th 583, 590. ["when the offense is committed to benefit a criminal street gang, [section 12022.53]'s additional punishments apply even if, as in this case, the defendant did not personally use or discharge a firearm but another principal did"].) We emphatically reject defendant's argument that the trial court's ruling conflicts with *Graham v. Florida* (2010) 560 U.S. 48, in which the United States Supreme Court stated that those individuals who do not intend to kill are "categorically less deserving of the most serious forms of punishment than are murderers." (*Id*. at p. 69.) The trial court's decision here was explicitly based on the circumstances that while defendant was not the shooter, his conduct as the driver of the car showed he harbored an intent to kill warranting the most serious punishment that could be imposed by the court. Thus, defendant's claim of error on this ground fails.

Defendant also contends the trial court abused its discretion in finding there were no mitigating factors that would warrant striking the firearm enhancements. He asks us to consider that his trial counsel mentioned several mitigating factors, but the court "totally ignored those factors," and by failing to consider anything that happened after the offenses, abused its discretion. However, his argument misconstrues our authority as an appellate court. "Sentencing courts have wide discretion in weighing aggravating and mitigating factors [citations], and may balance them against each other in 'qualitative as well as quantitative terms' [citation] . . . . We must affirm unless there is a clear showing the sentence choice was arbitrary or irrational." (*People v. Oberreuter* (1988) 204 Cal.App.3d 884, 887, disapproved on other grounds in *People v. Walker* (1991) 54 Cal.3d 1013, 1022.) The sentencing court is free to minimize or disregard altogether an arguably mitigating factor and *need not set forth its reasons for rejecting one*. (See *People v. Lamb* (1988) 206 Cal.App.3d 397, 401; *People v. Holguin* (1989) 213 Cal.App.3d 1308, 1317–1318 ("[t]he trial court is not required to set forth its reasons for rejecting a mitigating factor;" "unless the record affirmatively indicated otherwise, the trial court is deemed to have considered all relevant criteria, including any mitigating factors"].) Here, the court's failure to articulate the sentencing factors mentioned by defense counsel does not indicate the court did not consider those arguments in reaching its decision. The

court explicitly stated it had "reviewed all the evidence and testimony that I heard at the sentencing proceedings," and found "no factors in mitigation" that indicated the court should exercise its discretion in the interest of justice by striking the firearm enhancements. Thus, defendant's claim of error on this ground fails.

Defendant additionally contends the trial court abused its discretion "by failing to give any consideration to striking fewer than all three firearm enhancements." However, the argument fails because the court specifically stated it was aware it had the discretion "to strike some or all of these penalty enhancements," and for the reasons stated on the record, it declined to so exercise that discretion.

Finally, we are aware of the recent opinions of our colleagues in Division Five of this court (*People v. Morrison* (2019) 34 Cal.App.5th 217 (*Morrison*)) and the Fifth District (*People v. Tirado* (Aug. 12, 2019, F076836) __ Cal.App.5th __ [2019 Cal. App. Lexis 739] (*Tirado*). In *Morrison*, the court held that, when asked to strike or dismiss a firearm enhancement under section 12022.53, subdivision (d), the trial court also had the discretion under section 12022.53(h), to impose a lesser, uncharged firearm enhancement under subdivision (b) or (c) of section 12022.53, as a middle ground to the lifetime enhancement under subdivision (d) of section 12022.53, in the interest of justice under section 1385. (*Morrison*, *supra*, at pp. 223, 224.) The *Tirado* court respectfully disagreed with *Morrison*, holding that, when asked to strike or dismiss a firearm enhancement under section 12022.53, subdivision (d), the court had only the discretion under section 12022.53(h), to either strike or dismiss that enhancement, and did not have the discretion to substitute a lesser, uncharged firearm enhancement under subdivision (b) or (c) of section 12022.53. (*Tirado*, *supra*, 2019 Cal. App. Lexis at pp.*1–2, 6–10.)

Concededly, at the time of the resentencing here, the trial court did not have the benefit of the decisions in *Morrison* or *Tirado*. Nonetheless, we need not now address either the proper statutory interpretation of section 12022.53(h), or the limits of the trial court's discretionary authority under the statute. Even assuming we followed *Morrison*, we have no doubt that on this record the trial court's decision would remain unchanged if the matter were remanded for resentencing. Although recognizing its statutory authority

to strike one, two, or all three firearm enhancements, the trial court refused to strike any of the firearm enhancements, stating emphatically, and on more than one occasion, that it would not only not be in the interest of justice to strike the enhancements, but it would be "*a travesty of justice*" for the court to strike those enhancements in light of the circumstances of the crimes. (Italics added.) Moreover, the record shows the trial court was well aware that the effect of its decision would be that defendant would spend the remainder of his life in prison assuming no changes were made in the originally imposed sentences. Thus, there is no possibility that if the matter were remanded the trial court would choose to exercise its discretion to impose lesser firearm enhancements under section 12022.53, subdivision (b) or (c), as a middle ground to the lifetime enhancements under section 12022.53, subdivision (d). Accordingly, we deny defendant's request for a remand for resentencing. (See *People v. Williams* (1996) 46 Cal.App.4th 1767, 1783 ["under the circumstance, an order of remand for a clarified statement of reasons would be no more than an idle act"].)

DISPOSITION

The sentences are affirmed.

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Petrou, J.

WE CONCUR:

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Siggins, P.J.

_____
Wick, J.*

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* Judge of the Superior Court of Sonoma County, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.